

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

In The

**Supreme Court of the United States**

October Term 1977

No. 77 - 451

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,  
RENALD ROSSA, JOSEPH CICARDINI, NORMAN  
HOWARD, UMBERTO GUIDOTTI, ARTHUR  
TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B.  
SETTLE, LEO WHITE, DANIEL DUBANIEWICZ,  
ADOLPH DONADEO, H.J. HUEMRICH and FRANCIS  
KEENAN, all as Trustees ad litem of THE WESTERN  
PENNSYLVANIA HOTEL, CLUB, MOTEL AND  
RESTAURANT EMPLOYEES PENSION FUND, and/or  
SUCCESSOR TO TRUSTEES OF THE HOTEL AND  
RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION  
237 INSURANCE AND WELFARE TRUST FUND  
TRUSTEES OF THE HOTEL AND RESTAURANT  
EMPLOYEES ALLIANCE LOCAL UNION-237 PENSION  
TRUST FUND,

and

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,  
RENALD ROSSA, JOSEPH CICARDINI, NORMAN  
*(Continued on Reverse)*

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

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## OPINIONS BELOW

The Opinions of the United States Court of Appeals for the Third Circuit and of the United States District Court for the

### Opinions Below

Western District of Pennsylvania are as set out in the Appendix attached to the Petition.

### JURISDICTION

Jurisdiction herein is as set out in the Petition; and in addition thereto, as defined in Rule 19(b) of this Honorable Court.

### QUESTION PRESENTED

Where the Petition turns entirely on facts already resolved by the District Court and by affirmation of the Court of Appeals, in favor of Respondents; and where the Petition contains gross misstatements of facts and disregards record admissions and stipulations, so as to give color of right to review, should a Writ of Certiorari issue?

## COUNTER STATEMENT OF THE CASE

Because the first statement in the "Introduction" under Petitioners' Statement of the Case on page 6 of the Petition narrows the issues involved in the case, as did the District Court to one "essentially an action for breach of an employment contract"; and because of the misrepresentation that the District Court found "the transfer (of local trust funds) was proper and conducted in the interest of the beneficiaries of the Fund", Respondents have added by appendix hereto the factual review showing the basis of other issues ruled out of the case by the District Court on stipulation that the International Funds be construed as constructive trustees of the millions of dollars illegally transferred to them, as alleged in plaintiff's Further Amendment to the Complaint (J.A. Vol. I 384a)

## ARGUMENTS

### I.

THE PETITION CONTAINS GROSS MIS-  
STATEMENTS, MISREPRESENTATIONS,  
DISREGARD OF THE RECORD FACTS,  
AND TOTALLY INAPPOSITE CITATIONS

By their Pre-Trial Statement, (J.A. Vol. II, p. 1046a) under the heading ISSUES, defendant Petitioners represented to the learned Chief District Trial Judge below that "... the only issue presented in the instant litigation is whether the plaintiff, John Kenny, was improperly deprived of the position as director of the funds by the defendant trustees." On trial, however, without any motions to expand the pre-trial issue, a plethora of new issues were urged upon the trial judge by Gerald Schilian, Esq.; and the trial judge afforded defendants an opportunity to produce evidence supporting same.

Defendants-Petitioners had produced no proof whatever to support the jaundiced accusations of their trial attorney.

## Arguments

Having failed to support the charges leveled against the plaintiff by their attorney at trial, the defendants-petitioners, by their attorneys, irresponsibly misrepresent to this Honorable Court that such unfounded charges were in fact established of record below.

After almost 300 pages of testimony in the non-jury trial, at J.A. Vol IV 1826a, the following exchange redefines the "issues" in the case:

"THE COURT: All right. I understand that the issues in this case are, first of all, the validity of the contract in its inception.

MR. SHERMAN: I would not---

THE COURT: The equivalent of duress, coercion are factors that have entered this picture. I am not ruling now.

MR. SHERMAN: No, your Honor.

MR. SCHILIAN: And the violation of any fiduciary duty.

THE COURT: In the inception of the contract?

MR. SCHILIAN: That is right.

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THE COURT: That goes to the validity, ab initio.

MR. SCHILIAN: Correct.

THE COURT: The second issue is in the termination if the court should find there was a valid contract in existence."

and at page 1828a:

"THE COURT: The Court will receive evidence and permit examination on the issue as to whether or not there was justification in terminating Mr. Kenny's contract, not with respect to the validity of mergers."

On both trial issues the District Court found for the plaintiff in the following language (App. to Petition, 7a, 8a):

"Although the defendants contend that Mr. Kenny was unwilling or unable to perform his duties as Director of the Trust Funds and that he was therefore terminated for just cause, the report of the study conducted by the William L. Meyers Co. does not establish that Mr. Kenny's performance was unsatisfactory.



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Mr. Meyers further dispelled any such inference by his testimony that the recommended improvements could have been implemented under Mr. Kenny's administration.

That the court finds no evidence to support the contention that Mr. Kenny used improper means to secure the contract or that the compensation provided in exchange for his services was not reasonable."

Further, in the District Court's Conclusions of Law (App. to Petition, 8a) the following:

"The contract of employment providing compensation to Mr. Kenny for his services as Director of the Funds violated neither the terms of the trust agreement nor the provisions of 29 U.S.C.A. sec. 1001 et seq. Nor does the evidence disclose just cause for the discontinuance of Mr. Kenny's salary or for the unilateral rescission of his employment contract. The subsequent transfer of the Trust Funds does not cure the breach."

## Arguments

From page 8 of the Petition through page 24 thereof, under the captions "Facts" and "Reasons for Granting the Writ" counsel for the Petitioners have departed from all bounds of propriety by falsely asserting unsupported argumentation as record, proven facts. Oblivious to their responsibility as officers of the Court and of a Petitioner's burden to adhere to truthful references showing matters only which were established in and considered by the Trial Court, or which, proven or offered for proof were disregarded or improperly rejected by the Trial Court; *Landy v. Federal Deposit Insurance Corp.* C.A. N.J. 1973, 486 F2d 139, cert. den. 94 S. Ct. 1979, 416 U.S. 960, 40 L. Ed 2d 312; *Ries v. Lynskey*, C.A. Ill., 1971, 452 F2d 172; counsel for Petitioners have rather indulged in fictionalizing the Petition so as to scandalously present both the plaintiff and the Trial Court in a completely false light.

For the convenience of this Honorable Court in reviewing the compendious record for consideration of the charges so flagrantly made

## Arguments

in the Petition, Respondents, by their counsel respectfully and as briefly as possible will point out the most flagrant, false, distorted or misrepresented assertions in the Petition, together with references to the Joint Appendix (four volumes) lodged with the Court at 77-445 herein, by Respondents, as Petitioners for Certiorari as to damages only.

1. At page 8, the Petition states:

"From 1968 on, Kenny mentioned to other union officials that "he (Kenny) wanted to take over the Pension and Welfare Funds".

At J.A. Vol. III 1751a, defendant Sanfilippo, the only person to testify concerning discussion relating to Kenny "taking over the reins in the Welfare and Pension Fund" did not attribute any of such discussion to Kenny; in fact he referred to an officer Umberto Guidiotti, and at J.A. Vol. III 1752a, an employer trustee, Gurdon Flagg, involved in such discussions.

The distortion in the Petition, actually quoted as if lifted verbatim from the record,

## Arguments

implies that Kenny intended to wrongfully "take over" the funds. Especially since Mr. Kenny died on June 28, 1977, prior to the docketing of either Petition for Certiorari in the within matter, it is perhaps significant that the late Hon. Wallace S. Gourley, Sen. Chief District Judge, who was assigned to most of the preliminary pre-trial matters in the case, at J.A. Vol. II 1006a, volunteered:

"THE COURT: Well, I don't know Mr. Kenny personally, but I know him by reputation. He is considered one of the outstanding labor leaders in this part of the United States."

2. Immediately following the "take over" distorted reference on page 8a, the Petition further asserts:

"Kenny had often suggested that someone send for a copy" (of a St. Louis fund director's contract)

Not a single word of testimony supports such misstatement. At J.A. Vol. III 1752a the defendant Sanfilippo specifically asserts

## Arguments

that employer trustee Gurdon Flagg, in a meeting of the Trust Fund on July 13, 1971, made the suggestion to send for the St. Louis director's contract; and at the same meeting, a resolution was unanimously adopted offering Mr. Kenny the position as director of the pension and welfare funds, and a completed contract was read. (J.A. Vol. IV 2138a-2140a Minutes of Trustees Meeting). The McVey contract was not mailed until August 2, 1971 (J.A. Vol. III 1672a, 1.23).

3. At the top of page 9, the Petition states:

"The trustees made no offer regarding the terms of such employment and did not request that a written contract of employment be prepared. Nevertheless, at the insistence of the plaintiff, the Fund attorney, Herman Lipsitz, drafted a full employment contract...."

Withheld from this Honorable Court in the foregoing misstatement is the record fact the Herman Lipsitz, Esq. not only was a witness for the defendant Petitioners on

## Arguments

the trial, but he actually was and is the senior member of the firm LIPSITZ, NASSAU, SCHWARTZ & EVANS in Pittsburgh, Penna. who represented the defendant-Petitioners in the entire proceedings in the District Court through trial. Prior to trial no such charge as implied in the printed accusation above was made anywhere on or in the record.

Said witness Lipsitz, at J.A. Vol. III 1676a testified as follows:

"Q. Did any of the trustees, at that time, ask you to prepare a written contract?

A. As I recall offhand, pursuant to this motion I was asked to have a contract prepared by the Board.

Q. By the Board?

A. Right."

Further, regarding the contents of the contract, the following from Mr. Lipsitz at J.A. 1682a-1683a:

"Q. You and Mr. Kenny discussed every part of it?

A. Yes.

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Q. And you had no discussion with any of the other trustees privately, concerning that document, before it was presented to them?

A. Privately, no, before the Board.

Q. Before it was presented to them on October 21, 1971?

A. Privately, no. We did explore all facets of the contract with the entire Board."

4. The misleading theme and implication that the defendant-Petitioners were toally unaware that a completed employment contract for Kenny was to be presented to them at the trustees' meeting on October 21, 1971 continues for the entire lower half of page 9 of the Petition. In fact, as appears of record at J.A. Vol. IV 2138a, 2139a, the Minutes of the Trustees' meeting of July 13, 1971 reports "A discussion" concerning the growth of the pension and welfare funds "so substantially over the past number of years .....that it appears necessary at this time



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that the Funds be directed by a person who has had complete and full knowledge of these funds and who is thoroughly versed in the operation of these matters; Mr. Flagg was of the opinion that since John Kenny was actually the originator and the main moving force in the creation of the Trust Funds and since he was primarily responsible for building the Funds to the point where they exist today that the most logical person to assume a job of this kind would be John Kenny. A motion was then made by Gurdon Flagg that if John Kenny so desires, he be given the option to act as Chairman of Trustees as well as Director of the Fund with the salary to be agreed upon at such time as a decision would be reached. This motion was seconded by Leo White and carried."

Leo White and Gurdon Flagg, at all times were employer trustees with extensive management and financial experience. Mr. White, a



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defendant-Petitioner, testified on trial (J.A. Vol. IV 1965a-1980a). Mr. Flagg, a defendant-Petitioner, was not called to testify. Defendant-Petitioner White, at J.A. Vol. IV. 1978a, 11. 21-25, and 1978a, 11. 1-10 corroborated the minutes. Not a single witness contested same; nor was any other proof to the contrary adduced.

5. At page 10 of the Petition reference is made to one Howard McVey who had formerly been a director of a union welfare trust fund in St. Louis. When called on trial by defendants' counsel, (J.A. Vol. III 1646a) plaintiff's counsel objected for the reason that no mention had been made in pre-trial procedure of the witness who was completely unknown to plaintiff's counsel. Over objection, he testified as to his personal employment under a contract which he later forwarded to Pittsburgh in August, 1971 following the July 13, 1971 resolution by the defendant-Petitioners trustees to employ

## Arguments

Kenny. The last sentence on page 10, asserting: "Kenny's employment contract failed to establish standards of performance and attempted to emasculate the trustees by divesting them of supervisory authority over the Funds.", while conclusory argumentation, ignores the specific terms whereby the contract reserves to the trustees "the paramount authority.....as set forth under the terms of the Trust Agreements." Further, the same paragraph of the contract requires that under Kenny as director, the Funds had "to be operated in accordance with past practices." (J.A. Vol. I p. 21a, par. 2; also at App. pp. 48-55 in Petition filed at 77-445 herein)

6. In the first paragraph of page 11 of the Petition, the statement that: "The Fund job as performed by Kenny over the years required only a minimal effort and he did not intend to do any more upon assuming the Director's position" is totally unsupported in the record.

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7. Similarly, in the middle of page 10, the sordid statement that: "As a result of Kenny's actions, during the period May 1, 1973 through September 7, 1973, the Local 237 Funds were giving illegal financial support to Local 237 by paying the salary of its President" is not only totally false and without record evidence or proof whatever; but is contrary to the Pre-Trial Stipulation (J.A. Vol. II, 1177a-1180a, par. 23) showing that upon assuming the directorship of the Funds Kenny thereafter received no salary as President of the union. Nor is there any testimony or evidence of any "actions" by Kenny in the said period to warrant the misstatement.

8. On page 12, the Petition challenges the "findings of the District Court" as to the testimony of William L. Meyers (Pet. App. 8a), regarding "Kenny's administration of the funds". Because of the recklessness of the charge against the District Court it is deemed necessary to point out that:

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(a) at no place in Meyer's testimony did he place blame on Kenny personally for even the slightest criticism of procedures, methods or policies observed by him;

(b) Meyers did not at any time suggest that Kenny be terminated; (J.A. Vol. IV, 1931a)

(c) Meyers specifically testified that he found "no evidence or even a case of one cent not having been accounted for.." (J.A. Vol. IV, 1882a)

(d) Kenny cooperated with Meyers and delivered to him all books and records of the Funds; (J.A. Vol. IV, 1861a).

(e) Meyers found that: "The administrative people were conscientious..." (J.A. Vol. IV, 1875a) and that the staff "were doing very well under extremely unacceptable conditions.." (J.A. Vol. IV, 1887a); and that they "did a fine job under unacceptable conditions.." (J.A. Vol. IV, 1888a).

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(f) Meyers observed that: "They had a consultant firm on retainer at the time and they had a full administrative staff." He added: "I felt---and I don't know but what, to this day, it was true---if they had simply done what I had in the report, they could have accomplished it--The firm that they had as a consultant was and is nationally recognized." (J.A. Vol. IV, 1898a)

(g) Meyers didn't know who set up the system which he criticized in part; but he did not report to the international union that it was Kenny who did so. (J.A. Vol. IV 1927a-1928a)

The Meyers criticisms referred to on pages 12, 13, 14 and 15 of the Petition were not at all directed at Kenny personally, as therein implied.

9. Contrary to the speculation set out on page 12, subparagraph (a) that the funds "could have been earning higher interest." prior to the advent of Meyers, the evidence established, over the strenuous objections of counsel for defendant-Petitioner, (J.A.

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Vol. IV, 1817a-1841a) by Plaintiff's Exhibit 28 (J.A. Vol. III, 1410a-1416a) that "until the advent of Mr. Meyers we achieved a substantial amount of progress with respect to benefits in the form of welfare for our members and employees of the Employers.... Since the advent of Mr. Meyers we have secured not one single increase in any benefit; in fact, we are currently being put in a position to retrench promises we have made to the members concerning any increase in Pension Retirement Benefits..." and specific complaints regarding promises not kept by Meyers, investments bringing in less interest returns, excessive expenditures, "start-up costs", legal fees, unexplained "salaries", "Trustee reimbursements", "Administrative fees", "consulting fees", "Actuarial Fee" and failure in payment of claims, inter alia, as opposed to prior administration with Kenny as director, had quickly resulted.

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10. The most glaring and arrogant falsehood summarizing the foregoing misrepresentations is set out on page 15 of the Petition as follows: "As a result of Kenny's non-performance on behalf of the Funds, he was discharged and his salary discontinued at a meeting of the trustees of August 19, 1974."

Not only was Kenny never charged or notified of any nonperformance; he was not even notified of the reason for the trustees' intended suspension of his salary payments until Leonard Boreman, Esq., then representing Kenny had written to defendant Sanfilippo, chairman of the Board of local Trustees (J.A. Vol. IV, 2185a) demanding that the trustees desist from "systematically removing from the control and direction of Mr. Kenny" his duties and placing them "in other hands." In response to Mr. Boreman's letter, defendant-Petitioner's record counsel herein, Robert Mozer, Esq. replied, on August 20, 1974, (J.A. Vol. IV, 2186a) advising that: "The Trustees unanimously voted to forthwith



## Arguments

cease all payments of monies to John J. Kenny" without setting forth any reason therefor. The real reason, however, was that the trustees had already turned over all of Kenny's duties to Meyers, as all defendant-Petitioners had already admitted in their sworn answers to Plaintiff's Interrogatories.

Plaintiff's Interrogatory 24(c), (J.A. Vol. I, 70a) asked:

"24(c) Were any written obligations of the Trusts referred to in Interrogatories 2 and 3 not assumed by you? If so, state the manner in which you officially and formally rejected such obligations, giving grounds asserted by you for said rejections."

The answers by each and every defendant-Petitioner were:

"(c) The alleged contract with plaintiff Kenny was not assumed. He was removed as Chairman of the Board of Trustees on October 25, 1973; he was removed as Trustee on March 7, 1974. Any responsibility for Fund



## Arguments

administration was given to the William L. Meyers Co. on March 7, 1974. (Sanfilippo de. J.A. Vol. I 90a)

The remaining defendant-Petitioners refused to state that the Kenny contract was not assumed; and they added to the last sentence of their answer:

"On March 7, 1974 William L. Meyers Company was named Fund Administrator and Kenny, therefore, could have no responsibility for Fund administration."

(Dep. Prince, J.A. Vol. I 173a)

(Dep. Kern, J.A. Vol. I 180a)

(Dep. Rossa, J.A. Vol. I 187a)

(Dep. Cicardini, J.A. Vol. I 193a)

(Dep. Howard, J.A. Vol. I 199a-200a)

(Dep. Tatangelo, A.A. Vol I 206a-207a)

(Dep. Flass, J.A. Vol. I 214a)

(Dep. Blandi, J.A. Vol. I 221a)

(Dep. Settle, J.A. Vol. I 228a)

(Dep. White, J.A. Vol. I 235a)

(Dep. Dubaniewicz, J.A. Vol. I 243a)

## Arguments

(Dep. Donadeo, J.A. Vol. I 249a)

(Dep. Keenan, J.A. Vol I 255a)

Moreover, plaintiff's Interrogatory 25(d) (J.A. Vol. I, 72a) pointedly asked:

"(d) During the existence of Local 237 Hotel and Restaurant Employees Alliance, or of the Hotel and Restaurant Employees Alliance Local 237 Insurance and Welfare Trust Fund and of the Hotel and Restaurant Employees Alliance Local 237 Pension Trust Fund, was any challenge made in writing to the lawfulness of the employment contract or the services of plaintiff in relation thereto?"

The unanimous sworn answers of every defendant-Petitioner was "No."

(Dep. Sanfilippo, J.A. Vol. I 90a)

(Dep. Prince, J.A. Vol. I 173a)

(Dep. Kern, J.A. Vol. I 181a)

(Dep. Rossa, J.A. Vol. I 187a)

(Dep. Cicardian, J.A. Vol. I 193a)

(Dep. Howard, J.A. Vol. I 200a)

(Dep. Tatangelo, J.A. Vol. I 207a)

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(Dep. Flagg, J.A. Vol. I 214a)

(Dep. Blandi, J.A. Vol. I 221a)

(Dep. Settle, J.A. Vol I 228a)

(Dep. White, J.A. Vol. I 236a)

(Dep. Dubaniewicz, J.A. Vol I 243a)

(Dep. Donadeo, J.A. Vol. I 249a)

(Dep. Keenan, J.A. Vol. I 255a)

11. On page 16, the black-faced heading which refers to "KENNY'S SELF DEALING.." is completely without basis in either the pleadings or the trial record, and is simply a scandalous jumping off point for the in-apposite citations relating to obligations of fiduciaries. No evidence whatever warrants even by inference or implication that Kenny ever did a single act which was for his own interest while in the position of Director of the Trust Funds.

12. The unwarranted slurs via arguments set out on pages 18, 19 and 20, are all without the slightest evidential support, especially since the Pre-Trial Stipulation (J.A. Vol. II, 1177a, 1179a, 1180a) clearly

## Arguments

shows that the employment contract was first offered to Kenny in July, 1971, that a formal contract was not only presented to him by the Board of Trustees on October 21, 1971, but all of the trustees signed same; and still Kenny did not accept same. Further, even after the unanimous Resolution of the trustees on June 14, 1972 permitting Kenny to select his own hours of work as Director he did not yet take the job; and that only after the International Union President approved the contract, Kenny undertook to begin his employment as of May 1, 1973.

In spite of the record, the Petition continues to argue that Kenny aggressively sought, pursued and finally wrote himself his contract.

13. Petitioners' second asserted reason for allowance of the writ, set out at the top of page 19 of the Petition is obviously an attempt to bring the matter within Rule 19(b) on alleged conflict between Circuits. It is not pointed out in said section wherein

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the District Court or Circuit Court of Appeals did decide any rule or principle of law in conflict with any of the citations therein. Actually, the entire argument is based on the failure of the lower courts to decide facts in favor of the Petitioners, so as to make applicable their citations.

In an appropriate case, as where the record amply demonstrates that a trial court has no evidence or record support for its findings of facts upon which adjudication and judgment have been premised, and a Court of Appeals permits such judgment to stand, this Honorable Court may and probably will grant certiorari; especially where an important, broad reaching public question is involved. Where, as herein, it is nowhere in the Petition shown that the District Court's Findings of Fact lacked record support, or that it improperly rejected proffered proof which may have resulted in contrary findings, and especially where those Findings have been reviewed and affirmed by the United

## Argument

States Court of Appeals, it is respectfully submitted that the specious second "reason" for allowance of the writ should be disregarded; *Hallmark Industries v. Reynolds Metals Co.*, 94 S. Ct. 2643; *United States v. Johnson*, 268 U.S. 220, 227.

This Honorable Court is certainly aware that the Employee Retirement Income Security Act became effective on December 31, 1974, (29 U.S.C. 1001 et seq.); and it is stipulated that Kenny's salary payments were terminated as of August 31, 1974 (J.A. Vol II 1181a); therefore no factual evidence of violations of ERISA were asserted or assertable in the original Complaint in this case. The Further Amended Complaint, filed in the District Court on May 1, 1975 (J.A. Vol. I, 309a-313a) certainly charges violations by the International Union Pension and Welfare Trust Funds under ERISA. The Further Amended Complaint specifically avers then current intention of those Funds, through Meyers, of illegally obtaining transfer of the several

## Arguments

millions of dollars in the Pittsburgh Trust Funds, to the international defendant-Petitioners. The ERISA issues thus raised below were not heard, counsel for defendant-Petitioners stipulating with the District Court that his international defendants were to be treated by the District Court as constructive trustees of the Pittsburgh funds for the purpose of the case. (J.A. Vol. IV, 1825a, 11. 21-25, 1826a 1. 1)

The Petition, however, attempts to make it appear that the defendant-Petitioners were charging Kenny with violations of ERISA. Neither the Petition for Removal to the District Court (J.A. Vol. I, 11a); nor the defendant-Petitioners' Amended Answer (J.A. Vol. I, 32a); nor even their Answer to plaintiff's Further Amedentment to the Complaint (J.A. Vol. I, 384a) assert any matter which violated ERISA. Nor, indeed was a word of evidence presented or offered by the defendant-Petitioners which would have constituted such violation. The District



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Court's second Conclusion of Law (Pet. App. 8a) that the employment contract "... violated neither the terms of the trust agreement nor the provisions of 29 U.S.C.A. 1001 et seq." is the only conclusion possible upon the record. Nor did the District Court assert any "standard of behavior" required by ERISA which could be reviewed herein as suggested on page 21 of the Petition, concluding the second "reason" for allowance of the writ.

14. The brazen assertion at page 23 of the Petition, beginning the fourth "reason" for allowance of the writ, that: "The District Court found the transfer was proper and conducted in the interest of the beneficiaries of the Fund" is a gross distortion of the record. The issue of illegality in the transfer was not before the District Court by its own trial ruling upon the strenuous insistence of counsel for defendant-Petitioners and despite the offer of proof by plaintiff's counsel (J.A. Vol. IV, 1817a-1824a); the



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District Court at 1824a ruling at lines 13, 14 that the transfer of funds "is a non-issue in this case by virtue of the stipulation."; to which ruling counsel for defendant-Petitioners stated: "Right".

The only conscionable view of the District Court's observation that: "There is no evidence that the transfer of the funds was made for any purpose other than to discharge the fiduciary duty of the trustees to administer the Trust Funds in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence required by statute" is that it referred to the ruling that kept such evidence out of the trial.

## II.

THE LIABILITY OF THE INTERNATIONAL  
FUNDS FOR ANY JUDGMENT OF THE COURT  
AGAINST THE LOCAL UNION TRUSTEES WAS  
STIPULATED BY COUNSEL FOR SAID  
INTERNATIONAL FUNDS

The fourth "reason" for allowance of the

## Arguments

writ, at page 23 of the Petition completely disregards the record stipulation of the trial attorney for the defendant-Petitioners, relied upon by the District Court in making the international funds constructive trustees, as previously pointed out herein. The record is very clear that:

(a) the employment contract of Kenny as Director of Local Union 237 pension and welfare trust funds was effected by the individually named persons who constituted the local management-employee participant members' boards of trustees, as named and identified in the Complaint, the Amended Complaint and in the Further Amended Complaint.

(b) Local 237 had, in March, 1974, been merged by the international union with Local 188 of the Bartenders Union to form Local Union 57. The same trustees of the former local 237 continued under new Declarations of Trust for said Local 57. (J.A. Vol. II, Pre-trial stipulation 1177a par. 5). The Local 57 trusts were pursuant to Declarations

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dated March 7, 1974. (J.A. Vol IV, 2105a)

(c) Kenny had been serving as Director of the Trust Funds since May 1, 1973, and continued to do so after the merger of March 7, 1974, until August 31, 1974, at which time his salary was terminated without explanation, charges, hearing or warning. (J.A. Vol. II, Stipulation, 1180a, par. 24)

(d) Suit was commenced in the within matter on December 9, 1974 in the Allegheny County Court of Common Pleas of Pennsylvania, and on January 8, 1975 removed to the District Court by defendant-Petitioners. (J.A. Vol. I, Docket Entries 2a)

(e) The international funds were, upon motions of counsel for plaintiff below and Orders of Court allowing said amendments, joined on October 22, 1975 and November 5, 1975 respectively (J.A. Vol. I, Docket entries, 5a)

(f) Effective January 28, 1975, by writing referred to as Merger Agreement, the Local

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57 trusts were transferred to the international funds. (J.A. Vol. IV 2134a, 2136a) and all trustees named as individual defendants in the complaints resigned. (par. 4 therein)

(g) Upon discovery of the transfer of about \$9,000,000.00 of the Local 57 trust funds and the resignation of all local trustees, without notice to plaintiff below, or to his counsel, the amendments to join the international funds as defendants below were presented and allowed.

(h) Defendant-Petitioners' counsel, urging suppression of the issues as to the illegality of the absorption of the millions of dollars of local trust funds into the international "funds" while the case was pending below, without notice to the member participants, the District Court or to counsel for plaintiff below, readily agreed that the international funds would pay any judgment rendered against the resigned local trustees. In the defendant-Petitioners' Pre-trial Narrative Summary (J.A. Vol. II, at 1047a) it was stated:

## Arguments

"Defendants have already offered in open court to stipulate that the International Funds, being the recipients of the assets of the Funds formerly held under the trust funds formerly controlled by the defendant trustees, that, therefore, the account of the Western Pennsylvania Fund Unit of the International Funds would be liable for any damage award which the Court may deem just and proper."

Further, at J.A. Vol. III, 1626a, at the start of the defense at the non-jury trial, the following:

"THE COURT: Before you being presenting your evidence, Mr. Schilian, I understand it has been agreed by---

MR. SCHILIAN: May we approach the bench, Your Honor?

"THE COURT: You may.

(The following proceedings were held at side bar:)

"THE COURT: It was agreed by the trustees of the fund, that if there is a judgment in this case in favor of the plaintiff, the fund---

## Arguments

MR. SCHILIAN: The International Fund.

THE COURT: The International Fund will assume responsibility for payment of such judgment or obligation.

MR. SCHILIAN: That is in the event---

MR. SHERMAN: They are parties by further amendment, Your Honor.

THE COURT: All right.

With that stipulation, you may proceed, Mr. Schilian.

MR. SCHILIAN: All right. We have agreed that the International Fund will be responsible--well, the Western Pennsylvania Unit of the International Fund will be responsible for any financial award the Court may make and, on that basis, it is understood that we have stipulated to the validity of the merger of the local Western Pennsylvania Fund into the International Fund.

MR. SHERMAN: The fact of merger, not the validity. I am not raising any question, but I can't stipulate to the validity.

## Arguments

THE COURT: For the purpose of these proceedings, it is a non-issue.

MR. SHERMAN: Yes.

MR. SCHILIAN: Will plaintiff also stipulate that the question of the merger of 237 and 188 are non-issues?

MR. SHERMAN: Absolutely. We just so stipulated.

MR. SCHILIAN: Okay, fine. Thank you.

THE COURT: So we need have no testimony or evidence concerning the transfer of funds.

MR. SCHILIAN: Right. Okay, thank you, Your Honor.

Further, at J.A. Vol. 1824a, the following:

THE COURT: So we don't get into any unnecessary detail with respect to this, it is my understanding that counsel's stipulation is that it is not necessary to trace these assets of what was originally the local funds for the purpose of impressing a constructive trust--for instance, it is not necessary to go through transfers in order to establish liability on the part of the



## Arguments

fund. This was the sum and substance. It is a non-issue in this case by virtue of the stipuation."

And finally at 1825a, 1826a:

"THE COURT: The legality of merger of funds, transfer of funds or anything else, is not an issue in this case, by virtue of a stipulation to the effect that the natural consequences of a constructive trust would be honored. Is this correct?

MR. SCHILIAN: That is my understanding."

In view of the foregoing, the latest effort as set out in "reason" IV of the Petition is an offer to start all over again in spite of the stipulations of counsel for defendant-Petitioners, and is hardly appropriate for review by certiorari in the Supreme Court.

## III.

RESPONDENTS ARE PETITIONERS  
FOR WRIT OF CERTIORARI AS TO  
DAMAGES ONLY AT 77-445 HEREIN

It is respectfully pointed out that while



## Arguments

Respondents in the within Petition sincerely urge that the Petition has not a scintilla of merit, and that it does not assert grounds for invoking the good offices and sparse time of this Honorable Court and its busy and capable staff, nevertheless, the partial but substantial issue as to damages awarded by the District Court is based upon clear error of the learned District Court; and that as a result of such error, no damages were awarded for the second five-year term of the contract, contrary to the long-established principles and decisions of this Honorable Court and of decisions of other Courts of Appeal and of the Supreme Court of Pennsylvania, as set forth in said Petition at 77-445, which was docketed September 20, 1977, the day before the docketing of the within Petition.

## CONCLUSION

The Petition misstates, distorts, misrepresents and disregards record facts, prior stipulations and procedural agreements with the District Court, in fashioning a basis for review, as set out herein. In sum, Petitioners seek review herein of fact-findings of the District Court, affirmed by the Court of Appeals, and which fact findings are amply supported by the record below, with the exception, not here involved, that the District Court erred as a matter of law in regard to the award of insufficient damages, as the Petition for Certiorari filed by Respondents at 77-445 herein shows.

The Petition fails to show any error in law or conflict with any pertinent decisions of other Circuits which require reconciliation herein.

No conduct of Respondents' Decedent, plaintiff below, was shown to be in violation of the Employee Retirement Income Security Act of 1974; and no standard for fiduciary

### Conclusion

behavior under said act was declared by the courts below so as to require or invite review by certiorari herein.

WHEREFORE it is respectfully suggested that this Honorable Court deny the Petition requesting issuance of the Writ of Certiorari in the within matter.

Respectfully submitted,

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1709 Blvd. of the Allies,  
Pittsburgh, Penna. 15219  
412 4717777  
Counsel for Respondents

## APPENDIX

1a

### COUNTER-HISTORY FROM RECORD

The Plaintiff, prior to his resignation from the elected post on September 7, 1973, had been the President of Local 237 of the Hotel and Restaurant Employees Alliance for thirty-seven (37) years. Since about 1938, when Plaintiff first negotiated the establishment of welfare and thereafter pension funds for the members whose employers made contributions pursuant to labor-relations contracts, the Plaintiff, in addition, served as chairman of the two funds, in accordance with the requirements of the Declarations of Trusts, as amended from time to time through 1972. The Plaintiff had not received salary from the trusts, but was paid by Local 237 as president. By 1971 the two trusts had grown to about Nine Million (\$9,000,000.00) Dollars, and the trustees adopted resolutions and amendments authorizing employment of a single director over both funds. The minutes of the Trusts reflect consideration of the position to be called "Chairman-Director" prior to the meeting of October 21, 1971; however, on the latter date formal, unanimous vote of the trustees of both Funds offered the position to Plaintiff, and a copy of the proffered contract was read into the minutes; (Vol. I Jt. App. p. 272a-281a). The motion to adopt was made by Gordon Flagg, an employer-trustee, and seconded by Louis Sanfilippo, a union-trustee (Defendant herein and now President of Local 57 which in 1974 absorbed the former Local 237). The Plaintiff was unwilling to accept his newly offered post without giving the matter extended consideration, and asked the Union and Trust

**Counter-history from record**

Funds' lawyer, Herman Lipsitz, to review the legality of his holding the presidency of Local 237 at the same time as the directorship of the Funds. Since Paragraph 5 of the proffered contract (Vol. I Jt. App. p. 521a) required that Plaintiff devote "full time" to the directorship, he declined to accept same, preferring to continue in his office as President of Local 237. By Resolutions adopted by the trustees unanimously on June 14, 1972, an amendment to the proffered contract eliminated the requirement that Plaintiff devote full time to the directorship, so that he could continue as President of the Local Union (Vol. I Jt. App. p. 290a-523a). At this time, the Plaintiff and Attorney Lipsitz at the Plaintiff's insistence, inquired of the then International Union President Ed. S. Miller whether the office of president would present any conflict of interest with that of director of the Trusts. Eventually, by letter dated March 2, 1973, the Plaintiff wrote to General President Miller offering to act as Local Union President without salary if necessary to assume the position as Director of the Trusts; and he first received a reply dated March 8, 1973 stating that "... it would not be in the best interests of Local 237" for Plaintiff "to remain as a non-salaried President of Local 237 while employed as a Director ..." of the Trusts. Upon further consideration, on April 26, 1973, General President Miller wrote to the Plaintiff that he had reviewed the matter with the International Union's General Counsel, and that, subject to the provisions set out in said letter (Kenny Ex.) (Vol. IV Jt. App. p. 2183a). Plaintiff's suggestion of remaining as a non-salaried President of the Local Union was approved, so as to clear the way for Plaintiff's acceptance of the position of Director of the two Trust Funds. By his letter and signature of May 1, 1973, Plaintiff accepted the con-

### Counter-history from record

tract of employment; however, he still requested that Mr. Lipsitz research the law and federal agencies to determine if any ethical or legal conflict could exist. By letter of August 21, 1973, Plaintiff was assured by Mr. Lipsitz that a thorough research of the federal laws and inquiry of the United States Department of Labor was completed and that "... there exists no conflict of interest." (Kenny Ex.) (Vol. IV Jt. App. p. 2181a). The Plaintiff continued to act as Director of the Funds.

The following aspect of the case was ruled to be irrelevant and therefore not admissible on trial, as not bearing on the right of the plaintiff under his employment contract; however, only by ignoring the record establishing same under such ruling (Test., App. Vol. IV, p. 1821a) could the learned Chief District Judge find: "There is no evidence that the transfer of the funds was made for any purpose other than to discharge the fiduciary duty of the trustees to administer the Trust Funds in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence required by statute." Since counsel for *Petitioners* insisted that the discovery depositions be incorporated in the Joint Appendix, it appears that the following summary of such proof of the assertions made in plaintiff's answer to the affirmative defenses asserted as reason for the unilateral termination of plaintiff's employment be here set forth:

Between May 1, 1973 and September 7, 1973, these pertinent events occurred: International General President Miller was succeeded by Edward Hanley; and the latter, through his "administrative assistant" Anselmo, International Organizer Cicardini (Defendant) and Hanley's friend, William L. Meyers, of Naperville, Illi-



**Counter-history from record**

nois, and former Trustee of a Chicago Local Union Trust, set forth on an intense, and not always overt, plan to obtain possession of the millions of dollars in the Local 237 Pension and Welfare Funds then under Directorship and protection of the Plaintiff. In the latter half of 1973 (in fact not until December, 1974) the International Union, its officers and agents, had absolutely no legal, constitutional or contract right to in any way interfere with the administration of the Local 237 Trusts; however, Hanley, Anselmo and Meyers apparently determined to remove Plaintiff as a practical obstacle to their plan, by first attempting to intimidate him on threats of "charges", which threats being ineffectual, by circumventing him and conspiring with his successor as (appointed) President of Local 237, Sanfilippo. Meyers was sent into Pittsburgh by Hanley to "investigate" the Local 237 Trusts for irregularities. Rather than resist, Plaintiff joined the other Trustees in inviting him to do so. His report titled "An Examination of the Hotel and Restaurant Employees Local 237 Insurance and Welfare Trust Fund and Pension Fund" (Meyers Dep. Ex. 1) at pages 42, 61 and 66 noted with displeasure that the Trust Declarations required that the Chairman of both trusts be the elected President of Local 237; that the Declaration required that the Funds be located in Local 237 offices; and although he found that: "The Staff, though lacking adequate supervision, perform well . . ." and that . . . "claims experience appears well within the criteria anticipated by the actuary" (p. 108), Meyers recommended that the provision of Article VII, Section 12, of the Local Declarations of Trusts requiring that the Trust Fund offices be located in Local 237's offices be eliminated by amendment (p. 112) and further recommended that "investment



### Counter-history from record

counsel should be retained" (p. 114). Of course, Meyers had already been selected as such "investment counsel" by the International. Further, nationally prominent Martin Segal Co., the largest pension and welfare trust counsellors in the United States, had, from the beginning of the Local 237 Trusts been engaged by the trustees; but the Segal days were numbered, since apparently that company could not be relied on for effectuation of the Hanley-Anselmo-Cicardini scheme to obtain possession of Local 237 Trust Funds.

Announcing to the trustee meeting of October 25, 1973 that "... the International Union has indicated that it is illegal to have a designated Chairman as our present Agreement and Declaration of Trusts reads ... " Local 237 President Sanfilippo ordered the Plaintiff removed from the Chairmanship, and called for a motion to amend the Trust Declarations to confer upon the trustees the sole power to elect the trust officers (Minutes of Pension and Welfare Trusts of October 25, 1973) (Vol. IV Jt. App. p 2152a). What the Minutes do not disclose, however, is that Hanley, Anselmo and Cicardini had in advance secretly met with Sanfilippo and others to decide upon the action of the trustees (Sanfilippo Dep. pp. 45, 46, 47) (Vol. II Jt. App. p. 803a-806a). With the resignation of Plaintiff as President of Local 237, the Local was ordered ("dictated", Sanfilippo Dep. p. 20) (Vol. II Jt. App. p. 769a) by the International Union to be merged with financially defunct Local 188, Bartenders' Union, into Local 57, thereby obviously diluting Plaintiff's personal influence in the Local. Immediately upon the accomplishment of the "merger" of the two local unions, done without notice to or vote of the membership, and completely without constitutional provision therefor, the Local 237 Welfare Trust and the

**Counter-history from record**

Pension Trust were "transferred" to the newly formed Western Pennsylvania Hotel, Club, Motel and Restaurant Employees' Trusts on March 7, 1974, under a Declaration eliminating the requirement that the local member-participant union appoint the union trustees thereunder (setting the stage for actual transfer of ownership of the Funds to the International-controlled Welfare and Pension Funds). The Plaintiff was misled into believing that the maneuver of the merger and transfer were in effect only changes of names, and that, with himself continuing to act as Director of the Funds, the participants therein would continue to have their legal and equitable interests protected. The temporary retention of the Plaintiff in his contract position, however, was a ploy, as the International officers, and their agent Meyers, were already setting up the International Funds and directing their plans for obtaining "transfer" of the Local Trust Funds thereto, all without notice to the Plaintiff, and completely without the knowledge of the participant owner-members in the funds.

The International Welfare Fund was set up at the suggestion of William Meyers, Defendant (as was the International Pension Fund), according to Meyers' testimony (his Dep. pp. 31, 32) (Vol. II Jt. App. p. 693a). Meyers stated that the International Welfare Fund was set up about May, 1974, and the Pension Fund in the fall of 1974, but prior to the December, 1974 Special Convention of the International Union at San Francisco, California, where Article XXII was allegedly adopted as set forth in the Exhibit attached to the Affidavit of Gerald Schilian, Esq., paragraph 7, (Vol. I Jt. App. p. 319a) supporting his motion to strike the Further Amendment to the Complaint. The sequence of events, namely,

### Counter-history from record

Meyers' suggestion for establishment of the Funds, their being set up prior to any Constitutional power for so doing, and the implementation of the suggestion by call of a "Special Convention" in San Francisco for the adoption of the amendment demonstrates the influence of Meyers on the actions of President Hanley of the International Union; and the control over such Funds is exercised by President Hanley (with, of course, "the approval of the General Executive Board"); however, such "control" is delegated to Defendant Meyers by contract (Meyers Dep. p. 36) (Vol. II Jt. App. p. 698a). Meyers and Hanley are friends of at least ten (10) years duration and worked together prior to Hanley's appointment to the presidency of the International Union. The Trustees of the International Welfare Fund appointed by President Hanley are: Lou Cohen, Esquire, New York; Anthony Rey, an alleged hotel manager of Atlantic City; and two union members, Frank Preiss of New York and Frank Gerace of Atlantic City (Meyers Dep. p. 25) (Vol. II Jt. App. p. 687a); (Pilkenton Dep. p. 14) (Vol. II Jt. App. p. 1063a). The Trustees of the International Pension Fund, appointed by President Hanley are: Lou Cohen, Esquire, New York; Paul McCastland, union member, Florida; Dominic Luongo, and Frederick, of California, and Albert O'Neill (Meyers Dep. pp. 30-31) (Vol. II Jt. App. p. 692a); (Pilkenton Dep. p. 14) (Vol. II Jt. App. p. 1063a). No trustee is named by either the employer contributors or the local union member-participants.

Having cut off the Plaintiff from any information as to the proceedings under the direction of Meyers and the International's "organizer" Cicardini, Sanfilippo and White, the latter two Western Pennsylvania Trustees

## Counter-history from record

readily cooperating with the International officers, and their man Meyers, moved quickly to eliminate the Trustees locally from any control over the Trust Funds, and prepared or mandated the resignations of all Local Trustees on April 1, 1975, simultaneously convincing them that they had "transferred ownership" in both Trust Funds to the International Welfare and Pension Funds. The letters directing the transfer of assets of the funds in the Mellon, Pittsburgh National and Equibank depositories, directed by Meyers, and undoubtedly prepared by him or at his direction, signed by Sanfilippo and White, Defendants, and dated April 17, 1975, (over two weeks after resignation of all the Trustees, and without any Resolution of the Trustees authorizing the two to execute same) named the transferee as "Escrow Account 453, Bank of Naperville, Naperville, Illinois." When asked on his deposition concerning said Escrow Account's ownership, Sanfilippo denied that he had signed such a transfer, and had no knowledge of the account or its owner (Sanfilippo Dep. pp. 115-120) (Vol. II Jt. App. p. 864a-869a). White offered the false testimony that the Escrow Account was owned by the Western Pennsylvania Trusts (White Dep. P. 54) (Vol. I Jt. App. p. 592a), until his counsel Schilian shouted a "stipulated" denial of his testimony into the record. Meyers, more surprisingly, testified that he knew nothing of the account, and that neither he nor his corporation "owned" or set up same (Meyers Dep. pp. 74-75) (Vol. II Jt. App. p. 736a-737a). Meyers lives in Naperville, Illinois, and has his personal accounts at the Naperville Bank, as does his wife. It was only by taking the deposition of the vice-president of the Naperville Bank, Pilkenton, under subpoena duces tecum, and under searching cross-examination, that it was disclosed that

no Escrow Account 453 actually exists; however, notes of a telephone discussion of April 15, 1975, on a yellow, lined legal-type note pad, showed that Meyers had personally "reserved" the number for an anticipated escrow account in his own name.

Since September, 1974, payment to the Plaintiff under his written contract ceased, without stated reason and Plaintiff was no longer informed as to meetings of the Trustees but has at all times been ready and able to carry out his duties as Director.

The foregoing extensive statement is necessitated by the evasive and misleading Answer and Amended Answer to the Complaint, as was shown in summary in paragraph 7 of the Affidavit of Harry Alan Sherman opposing the Motions of the Defendants to strike the Further Amendment to the Complaint Joining Meyers and the International Welfare Trust Fund as Defendants (Vol I Jt. App. p. 333a). The Amended Answer, in addition to the general denials and simple counterclaim set forth in the original Answer, adds counts as affirmative unsupportable defenses attempting to justify "termination" of the contract sued upon. Plaintiff's Answer to such baseless defenses was filed, and the depositions of Sanfilippo, White, Meyers, the trust representatives of the three major Pittsburgh banks and Vice-President Pilkenton of the Bank of Naperville have demonstrably supported Plaintiff's assertions in both his Further Amendment to the Complaint and his Answer to the baseless affirmative defenses aforesaid.

The defendants' Pre-Trial Statement (Joint App. Vol. II p. 1042a) under the caption "ISSUES", declares:



**Counter-history from record**

"Notwithstanding the plaintiff's unabashed attempt to confuse the question to be decided by the Court, the only issue presented in the instant litigation is whether the plaintiff, John Kenny, was improperly deprived of the position as director of the Funds by the defendant trustees."

\* \* \* \* \*

"Defendants have already offered in open court to stipulate that the International Funds, being the recipients of the assets of the Funds formerly held under the trust funds formerly controlled by the defendants trustees, that, therefore, the account of the Western Pennsylvania Fund unit of the International Funds would be liable for any damage award which the Court may deem just and proper."

The learned Chief District Judge has found that the defendants-appellants failed to establish any ground for terminating plaintiff's contract, that "The contract of employment providing compensation to Mr. Kenny for his services as Director of the Funds violated neither the terms of the trust agreement nor the provisions of 29 U.S.C.A. 1001 et seq. Nor does the evidence disclose just cause for the discontinuance of Mr. Kenny's salary or for the unilateral rescission of his employment contract."

The learned Trial Judge further concluded: "In view of Mr. Kenny's limited formal education (four years elementary school), his 73 years of age, and the fact that he has sustained two severe heart attacks in recent years, (Tr. 97-100), it is not likely that he would find employment elsewhere. It is therefore concluded that, as to the first five year period of the contract, Mr.

Kenny may recover \$128,290.30. The above considerations, in addition to those contained in Mr. Kenny's motion for advancement of the trial date, lead this court to conclude that it is not probable that Mr. Kenny would have exercised his option to renew the contract for an additional five-year term."

Defendants-Appellants then appealed from the final judgment entered pursuant to the Findings and Conclusions of the District Court.

Plaintiff-Cross-Appellant also appealed from the District Court's disallowance of the damages for the unexpired second five year term. Plaintiff actually had exercised his option for renewal for said term on record. The Circuit Court of Appeals affirmed.

No medical evidence was introduced to support a finding concerning plaintiff's incapacity to continue to perform his duties as director of the funds for the entire ten year term.

Plaintiff's claim has at all times been for the damages resulting to him for the full unexpired ten-year contract term, which includes the second five year period for which he exercised his option as appears from the following pleadings:

THE Petition for Removal

THE ANSWER AND COUNTERCLAIM

THE AMENDED ANSWER

PLAINTIFF'S REPLY TO COUNTERCLAIM AND AFFIRMATIVE  
AVERMENTS OF DEFENDANTS' AMENDED ANSWER

THE AMENDED COMPLAINT  
MOTION FOR LEAVE TO FURTHER AMEND THE COMPLAINT,  
JOINING THE INTERNATIONAL FUNDS AND ORDER

GRANTING SUCH LEAVE  
DEFENDANTS' ANSWER TO PLAINTIFF'S  
FURTHER AMENDED COMPLAINT